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IN THE

Supreme Court of the United States

October Term, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, DECEASED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

PETITIONERS' BRIEF

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OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported at 33 Fed. (2d) 724 and is also printed at R. p. 30. The opinion of the District Court for the District of Maryland is reported at 28 Fed. (2d) 887, and is also printed at R. p. 7.

JURISDICTION.

Judgment against the present petitioners was originally entered by the Circuit Court of Appeals on the

6th day of July, 1929. (R. 36). Petition for writ of certiorari was filed October 4, 1929, which was within three months (Sec. 8 of the Act of February 13, 1925, 43 Stat., 936) after the order of July 6, 1929. The petition for writ of certiorari was granted by this Court on October 14, 1929. (R. 37.)

STATEMENT OF THE CASE.

The facts are not in dispute and the case was submitted to the District Court upon an agreed statement of the facts. (R. 23.) So far as material to the issues involved, the facts are as follows:

James E. Tyler, a resident of the State of Maryland, died in said state on May 7, 1918, intestate, and petitioners were duly appointed administrators of his estate and are still acting as such. At his death the decedent and his wife were the owners of three hundred and fifty (350) shares of the common stock of the Kimball-Tyler Company, a West Virginia corporation doing business in Maryland, the stock standing on the books of the corporation in the names of "James E. Tyler and Ida H. Tyler, as tenants by the entireties", having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock, which at his death was valued at $59,193.42, and said sum was included by the Commissioner of Internal Revenue as a part of his gross estate in computing the estate tax liability under the revenue Act of 1916, thereby increasing said tax in the amount of $3,337.67. A claim for refund was seasonably filed and, upon its rejection, the administrators of the estate entered suit for recovery of this amount of the tax in the United States District Court for the District of Maryland (R. 1).

The United States filed two pleas in the District Court (R. 6) and upon issues joined (R. 6), trial was before the Court without a jury and verdict and judgment for the amount claimed were rendered for the taxpayer (R. 21–2). The Court rendered an opinion in the case in which it was held that Section 202 (c) of the Revenue Act of 1916 includes estates by the entireties, but since the effect of said Section 202 (c) of the act is to levy a direct tax upon decedent's estate contrary to Article 1, Secs. 2 and 9 of the Constitution, said section 202 (c) of the Revenue Act of 1916 is invalid in so far as it affects a tenancy by the entireties; and that the tax in this case in so far as it includes tenancies by the entireties, measures the tax upon decedent's estate by property which belongs to another, namely the surviving spouse, and for this reason is arbitrary and capricious and in violation of the due process clause of the Fifth Amendment to the Constitution (R. 7–21). The Circuit Court of Appeals reversed the judgment (R. 37) and rendered an opinion in which it was held that Congress intended to tax tenancies by the entireties and such a tax was not in violation of the Constitution or the Fifth Amendment thereof (R. 30–36).

There may be a tenancy by the entireties in personal property as well as real property in the State of Maryland.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that imposition of an estate tax upon the estate of a decedent which included the value of the interest held jointly by himself and spouse (who survived him) as tenants by the entireties did not amount to the imposition of a direct tax in violation of Article

1, Section 2, and Article 1, Section 9, of the Constitution of the United States.

2. The Circuit Court of Appeals erred in finding and holding that said tax did not amount to confiscation of property in violation of the due process clause of the Fifth Amendment of the Constitution inasmuch as the said tax is measured by the value of the interest of the surviving tenant as well as that of the deceased tenant by the entireties.

3. The Circuit Court of Appeals erred in finding and holding that Section 202 (c) of the Revenue Act of 1916 in so far as it includes tenancies by the entireties is valid.

4. The Circuit Court of Appeals erred in rendering a judgment in favor of the respondent in this Court and against the petitioner.

5. The Circuit Court of Appeals erred in refusing to enter a judgment in favor of the petitioner in this Court and against the respondent.

6. The findings and judgment of the Circuit Court of Appeals in this case are based on a wholly erroneous conception of the law and said Court misapplied and misinterpreted the applicable decisions of this Court.

ARGUMENT.

The Statutes involved are as follows:

Title II of the Revenue Act of 1916 (39 Stats., 756) provides, so far as pertinent to this case:

> "Section 201. That a tax (hereinafter in this Title referred to as the Tax), equal to the following percentages of the value of the net estate, to be determined as provided in Section 203, is hereby imposed upon the transfer of the net

estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: * * *

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivior, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent. * * *

"Sec. 203. That for the purpose of the tax value of the net estate shall be determined—

"(a) In the case of a resident by deducting from the value of the gross estate.

"(1) Such amounts for funeral expenses, * * * and

"(2) An exemption of $50,000."

The above provisions, with minor changes which are not material, are continued in the Revenue Acts of 1918, and 1921, at Section 401, 402 and 403 and in the Revenue Act of 1924 as Sections 301, 302 and 303.

Because of the fact that a tenancy by the entirety or by the entireties is a peculiar estate and exists only in the case of husband and wife and it is inaccurately described in the law, it has been questioned whether Congress intended to include tenancies by the entireties in the above provisions of the 1916 Act. See Blount vs. United States, 59 Ct. Cl., 328. In the Revenue Acts of 1924 and 1926 the language of

the provision was changed so as to read—"or as tenants by the entirety by the decedent and spouse."

The Commissioners of Internal Revenue has always claimed that the original provision contemplated the taxing of estates by the entireties and both the District Court and Circuit Court of Appeals for the Fourth Circuit in this case concurred in said holding. In this brief it will be assumed that such was the intention of Congress.

SUMMARY OF ARGUMENT.

Point A. Effect of decisions subsequent to decision of Circuit Court below.

Point B. Character of estates by the entireties.

Point C. Under the common law there is no transfer of title or interest in property upon the death of a tenant by the entireties.

Point D. It is a settled rule of property in Maryland that there is no transfer of any title or interest in property upon the death of a tenant by the entireties.

Point E. Inasmuch as the nature and incidents of an estate by the entireties constitute a rule of law of Maryland, such rule is binding upon the Federal Courts in determining the effect of the succession to the interest of a deceased tenant by the entireties in Maryland.

Point F. In so far as Section 202 (c) of the Revenue Act of 1916 attempts to tax the interest of a tenant by the entireties it is a direct tax upon the property itself, and in violation of Art. I, Sections 2 and 9 of the Constitution.

Point G. The tax is an arbitrary tax and in violation of the Fifth Amendment of the Constitution.

Point H. The decision in this case is inconsistent with the decision of this Court in the case of Chase National Bank v. United States, 278 U. S., 327,

and is irreconcilable with the decision of this Court in the case of Reinecke v. Northern Trust Co., 278 U. S., 339.

POINT A.

Effect of Decision Subsequent to Decision of Circuit Court Below.

Subsequent to the decision of the Circuit Court of Appeals in this case, the Circuit Court of Appeals for the Third Circuit in United States v. Provident Trust Company of Pennsylvania, et al., 35 Fed. (2d) 339, held exactly contrary to the decision of the Fourth Circuit. At the same time the same Court in the case of Commissioner of Internal Revenue v. Girard Trust Company, et al., Executors of the Estate of Woolston, 35 Fed. (2d) 343, affirmed the decision of the Board of Tax Appeals in that case on the authority of the case of United States v. Provident Trust Company, supra.

At the very outset we feel that this Court may well note the circumstances under which this issue comes before it. Ordinarily a petitioner or appellant must bear the burden of the argument in overcoming whatever presumption of correctness attaches to the decision appealed from and the burden of convincing the Appellate Court that it should take the affirmative step of reversing the decision below. Here, however, there are on the docket the two other cases above cited in which the Court has granted the government's petitions for writs of certiorari and in which as stated the decisions below on this same question are in the taxpayer's favor. These two cases are set for argument immediately following the argument in this case.

It appears, therefore, that the Court must either reverse the decision of the Circuit Court of Appeals

in the present case or reverse the decisions in the two cases decided by the Third Circuit Court of Appeals and there can be no presumption that the decision below in the present case is any more correct than the contrary decisions in the Provident Trust Company and Girard Trust Company cases. As a matter of fact if there is to be any presumption it should be the other way as the two cases from the Third Circuit were decided by that Court after the Fourth Circuit had rendered its opinion.

POINT B.

Character of Estates by the Entireties.

Perhaps special weight should be given to the decision of the Third Circuit in the Provident Trust Company case because the opinion in that case is by Circuit Judge Woolley, a lawyer brought up in the State of Delaware and steeped in knowledge of estates by the entireties which exist in Delaware in all their common law virility.

It should also be set out here, it is respectfully submitted, that in spite of the fact that in some jurisdictions estates by the entireties have either been repealed or modified by statute, the estate itself has many beneficent features. Of all the estates of the common law, it is the only one which is a complete protection of the family. The improvident man who is the co-tenant of an estate by the entireties with his wife cannot dispose of it or encumber it either voluntarily or involuntarily, for no judgment rendered against him during his lifetime can be collected from this estate after his death if the wife survives, nor is the estate liable in any way after his death to any debt that he may have created during his lifetime. Those who have lost familiarity with the estate in

its purity because of residence and practice in jurisdictions where it no longer exists might well think that the estate was one used solely to avoid the payment of taxes but it is a matter of common knowledge to everyone who lives in a state where the estate by the entireties still exists that it is not only a beneficent estate but that it is one very widely used for many reasons. In addition to those above cited, one that occurs to every lawyer familiar with it is that as to an estate by the entireties since the interest of the decedent ceases at his death and there is no transfer from him to anyone but his whole estate comes to an end, no administration is necessary or could be had, if there is no other estate, as only frequently happens.

Judge Woolley in his opinion quotes a decision of the Supreme Court of Pennsylvania in Biehl v. Martin, 236 Pa. 519, which he states discloses the rule of property which Pennsylvania has laid down with respect to an estate of this character and the same rule prevails in Maryland and decisions of the Maryland courts are to the same effect. For the convenience of the Court that description of this estate is attached to this brief as Appendix I.

POINT C.

Under the Common Law There Is No Transfer of Title or Interest in Property Upon the Death of a Tenant by the Entireties.

The decision of the Circuit Court of Appeals in this case is based upon the theory that because the tenants by the entireties were two separate individuals, there was in fact and in law a transfer upon the death of one of the tenants to the survivor because:

> "Whatever form of technical expression be used the fact remains that, upon the death of one of

the parties the survivor by operation of law succeeds to the interest which the decedent had in the property." (Record 38.)

On the contrary, it is an established principle of the common law, which has been recognized by this Court, that in fact and in law there is no **transfer** of title or of interest upon the death of a tenant by the entireties to the surviving tenant.

> "The survivor takes by virtue of the original grant or devise; he does not take a new or additional interest by virtue of survivorship, nor does he take by descent or intestate distribution."
> 30 C. J., 571;
> Hunt vs. Blackburn, 128 U. S., 464, 469;
> U. S. vs. Robinson, 183 Fed. Rept., 711;
> Hupfel's Sons vs. Getty, 299 Fed. Rep., 939;
> Biehl vs. Martin, 236 Pa., 519;
> Palmer vs. Mansfield (Mass.), 110 N. E., 283;
> Matter of Klatzl, 216 N. Y., 83.

There are no decisions of this Court to the contrary effect and as shown elsewhere in this brief (Point D), the test of the power of Congress is whether there was at death a transmission or transfer from the dead to the living of an interest in property; because it is that—the privilege or right of transfer which the State may change at any time and, therefore, may tax. Where there is no privilege there is no transfer and where there is no transfer there can be no tax. As stated by this Court in the opinion in the case of Nichols vs. Coolidge, 274 U. S., 531, 541.

> "Congress may lay an excise upon the **transfer** of property reckoned upon the value of the interest **which passes thereby.** But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results." (Emphasis ours.)

POINT D.

It is a Settled Rule of Property in the State of Maryland That There Is No Transfer of Any Interest in Property by the Death of a Tenant by the Entireties.

In the case of Marbury vs. Cole, 49 Md. 402, 411, it was held that:

> "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants nor are they tenants in common. They are in the contemplation of the common law but one person, and hence they take not by moieties but by the entireties. They are each seized of the entirety and the survivor takes the whole. As stated by Blackstone, husband and wife being considered as one person in law, they cannot take the estate by moieties but both are seized of the entireties, per tout, et non per my; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other but the whole must remain in the survivor. 2 Blac. Comm. 182. This has been the doctrine of the common law from an early period of its history for we find the principle as stated by Blackstone laid down in Littleton's Tenures, Section 291, from whence it has been almost literally transcribed by all subsequent writers on estates. See Co. Litt. 187; 2 Cruise Dig., 492; 1 Prest. Est., 131–2; 4 Kent's Comm., 362; 1 Wshb. R. Prop. (4th Ed.), 672, and the authorities there cited."

See also, Brewer vs. Bowersox, 98 Md., 567;
McCubbin vs. Stanford, 85 Md., 378;
Baker vs. Baker, 123 Md., 32;
Ades vs. Caplin, 132 Md., 66.

In Maryland there may be a tenancy by the entireties in personal property as well as real property. Brewer vs. Bowersox, supra; Baker vs. Baker, supra.

Under the decisions of the Courts of Maryland neither tenant can mortgage or convey any interest in an estate by the entireties without the consent of the other tenant. McCubbin vs. Stanford, supra.

The property would not pass to a tenant's trustee in bankruptcy.

Frey vs. McGaw, 127 Md., 23;
Ades vs. Caplin, supra.

In the case of Ades vs. Caplin, supra, the Court (at page 69) stated:

> "The nature of this estate forbids and prevents the sale or disposal of it, or any part of it, by the husband or wife, without the assent of both; the whole must remain to the survivor. The husband cannot convey, encumber, or at all prejudice, such estate to any greater extent than if it vested in the wife exclusively in her own right. He has no such estate as he can dispose to the prejudice of the wife's estate. The unity of the husband and wife as one person, and ownership of the estate by that person, prevents the disposition of it otherwise than jointly."

A Judgment against one tenant does not affect the property.

Jordan vs. Reynolds, 105 Md., 288.

POINT E.

Inasmuch as the Nature and Incidents of an Estate by the Entireties Constitute a Rule of Property Under the Law of Maryland, Such Rule Is Binding Upon the Federal Courts in Determining the Effect of the Succession to the Interest of a Deceased Tenant by the Entireties in Maryland.

Congress cannot declare that there is a transfer from a deceased tenant to the surviving tenant by the entireties in Maryland where the State law says there is none, without modifying the State law to that effect.

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> "Congress may lay an excise upon the **transfer** of property reckoned upon the value of the interest **which passes thereby.** But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results." (Emphasis ours.)

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POINT E.

Inasmuch as the Nature and Incidents of an Estate by the Entireties Constitute a Rule of Property Under the Law of Maryland, Such Rule Is Binding Upon the Federal Courts in Determining the Effect of the Succession to the Interest of a Deceased Tenant by the Entireties in Maryland.

Congress cannot declare that there is a transfer from a deceased tenant to the surviving tenant by the entireties in Maryland where the State law says there is none, without modifying the State law to that effect.

Congress cannot create a transfer merely for the purpose of imposing a tax thereon where under the law governing the transaction, there is no transfer.

In the case of Edward Hines, Yellow Pine Trustee, vs. Martin, et al., 268 U. S. 458, at page 464, Mr. Justice Stone, speaking for this Court, stated:

> "To avoid the uncertainty and injustice which result from the 'discordant elements of a substantial right which is protected in one set of Courts and denied in the Court with no superior to decide which is right' (Brine vs. Insurance Co., 96 U. S. 627) this Court has not hesitated when there has been a conflict of decisions between it and the State Court affecting a rule of property within the State, to overrule its own decisions and to follow the State decisions, once it has become evident that they have established a 'rule of property' as a settled law of the State."

See also, Clarke vs. Clarke, 178 U. S., 186;
Warburton vs. White, 176 U. S., 484;
U. S. vs. Title Insurance & Trust Co., 265 U. S., 486.

POINT F.

In so far as Section 202 (c) of the Revenue Act of 1916 Attempts to Tax the Interest of a Tenant by the Entireties It Is a Direct Tax Upon the Property Itself, and in Violation of Art. I, Sections 2 and 9, of the Constitution.

One of the absolute rights inherent in every citizen is that of property, it consists in the free use, enjoyment and disposal of all of his acquisitions without any control or diminution save only by the laws of the land.

1 Blackstone Commentaries, 138;
Buchanan vs. Worley, 245 U. S. 60, 74.

A tax upon any essential element of ownership is a tax upon the ownership of property and therefore

a tax upon the property itself because property is in reality nothing more or less than those elements which the law has always recognized as attaching to the owner of a thing.

Thus, in Brown vs. Maryland, 12 Wheat., 419, it was held that a tax on the sale of an article imported only for sale is a tax on the article itself.

> See also, Welton vs. Missouri, 91 U. S., 275;
> Cooke vs. Pennsylvania, 97 U. S., 566;
> Nicol vs. Ames, 173 U. S., 509.

In Pollock vs. Farmers Loan & Trust Company, 157 U. S., 429, it was held that a tax upon income derived from rents or profits or income of real or personal property was a tax upon the property itself.

Taxes upon property are direct taxes and under the Constitution must be uniform and be apportioned among the several States according to their respective numbers.

A tax upon the transfer or transmission of property upon the death of a person has been held to be a tax upon such privilege or right of **transfer,** and such a tax is held to be an indirect tax within the meaning of the Constitution of the United States.

> Plummer vs. Coler, 178 U. S., 115;
> Murdock vs. Ward, 178 U. S., 139;
> Knowlton vs. Moore, 178 U. S., 41.

In the case of Knowlton vs. Moore, supra, in which the late Chief Justice White delivered the opinion of the Court, it was shown that in this and other countries, so-called death duties, estate taxes, legacy taxes and inheritance taxes, all "rest in their essence upon the principle that death is the generating force from which the particular taxing power takes its being, and that it is the power to transmit, or the

transmission from the dead to the living on which such taxes are more immediately rested."

The subject of direct taxes has most recently been before this Court in Bromley vs. McCaughn, 280 U. S., 124. In that case the Court held that a tax imposed upon a transfer **inter vivos** was not a direct tax, but the entire decision rests upon the conclusion that Congress, under the Constitution, had the power to tax a **transfer.**

If, as is herein shown, the decedent had nothing but an estate which terminated at his death, and it was not transferred because of his death, since he had nothing which could be transferred during his life, then clearly the element is here lacking that the Court found present in a gift **inter vivos** and the imposition of a tax upon an estate by the entireties is clearly a tax upon property, and not being apportioned among the several states according to their respective numbers, it is unconstitutional.

With the above principles of law in mind it is perfectly clear that in so far as Sections 201–203 of the Revenue Act of 1916, attempt to tax the estate of a decedent upon the value of any property which he held as a tenant by the entireties it is a direct tax, and in violation of the Constitution of the United States because as shown elsewhere in this brief (Points C. and D.), the decedent **never** had more than a life interest in the property unless he survived his cotenant. His interest was one to which the privilege or right of disposition at his death never attached. It was only the right or privilege of transmitting the interest of the decedent's property upon his death which Congress had the power to tax, and inasmuch as he lacked any such privilege or right with respect to his interest in an estate by the entire-

ties, there is nothing to which the tax can attach. The rights of a tenant by the entireties are only such as would obtain if the State had never granted any right or privilege of transmitting the property upon the death of a person.

POINT G.

The Tax Is an Arbitrary Tax and in Violation of the Fifth Amendment of the Constitution.

Section 202 (c) of the Revenue Act of 1916 levies a tax upon the estate of one tenant by the entireties measured by the value of the entire property held by both tenants by the entireties "except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

It will be noted that the provision taxes as a transfer upon the death of a tenant by the entireties and as a part of his estate, not his interest which terminated at his death and which of course was not transferred, but the tax is levied upon the entire property. In other words, the statute levies the same tax that would have been levied if he had been the sole owner of the entire property during his life with the right to dispose of same at his death. It taxes the adverse interests in the property of the cotenant. Yet the fact is that from the creation of the estate, the surviving tenant became entitled to the same interest in the property as the decedent during his lifetime and also to the right of survivorship upon his death. Surely it is inescapable that by this statute the estate of the deceased tenant is taxed upon the property of the surviving tenant and it is, therefore, an arbitrary tax. The tax is so arbitrary and capricious as to amount to confiscation and is in violation of the Fifth Amendment of the Constitution. See Brushaker

vs. U. P. R. Co., 240 U. S., 1, 24; Barclay & Co. vs. Edwards, 267 U. S., 442, 450. In the case of a decedent owning no property whatever at the time of his death except his interest in an estate by the entireties, if his estate is taxable upon the value of that property no tax could be collected without recourse to the property belonging exclusively to the surviving tenant.

POINT H.

The Decision in This Case Is Inconsistent with the Decision of This Court in the Case of Chase National Bank vs. United States, 278 U. S., 327, and is Irreconcilable with the Decision of This Court in the Case of Reinecke vs. Northern Trust Company, 278 U. S., 339.

The holding of the Court below to the effect that there was a transfer upon the death of the decedent of all his interest in an estate by the entireties to the surviving tenant, by operation of law, is apparently bottomed upon the Court's interpretation of the decision of this Court in the case of Chase National Bank vs. United States, whereas a proper understanding of the decision of this Court in the Chase National Bank case lends no support whatever to the decision of the Court below in this case.

In the Chase National Bank case the decedent had the power to change at any time prior to his death the name of the beneficiary under certain insurance policies upon his life, and this Court held that the interest in the policies retained by the decedent was so great that the transfer to the beneficiaries was not completed until the death of the decedent when the power of control was terminated, and that the power until death of control or to direct the further enjoyment or possession of property after death may

be considered tantamount to its exercise and therefore constitutes a taxable transfer. The devolution of the property after the death of the tenant was in accordance with his will because he coul have made a different disposition of it at his death. In that sense the decedent transmitted the property upon his death.

The element of power to control the disposition of the property after death, which was the privilege or right held to be taxable in the Chase National Bank case, is entirely lacking in the case of the death of a tenant by the entireties. In the latter case there is no power to change or revoke the right of survivorship, which existed in the cotenant from the very inception of the estate. In the case of a tenancy by the entireties the deceased tenant did not during his lifetime have any power to sell, mortgage, or dispose of any part of the property. He could not in any way prejudice the interest of his cotenant and he was without any power whatever to change in any way the right of survivorship which existed in the cotenant. Is it to be believed that if the decedent in the Chase National Bank case had been so circumstanced with reference to the insurance policies which were the subject of that suit that the Court would have held that there was a taxable transfer to his estate?

See Lewellyn vs. Frick, 298 Fed. Rep., 803.

The construction adopted by the Court below in this case of the language of this Court in the Chase National Bank case is utterly irreconcilable with the decision of this Court rendered on the same day in the case of Reinecke vs. Northern Trust Company, 278 U. S., 339. In that case the decedent during his lifetime had created seven separate trusts. In two of the trusts he reserved the income to himself for his life and after his death the income was to be

paid to certain other beneficiaries until the termination of the trust when the estate went to remaindermen. In each of these two trusts the decedent had reserved the power to revoke, alter, change or modify the trusts, but said power could not be exercised without the consent of the single beneficiary in four of the other trusts and the consent of the majority of the beneficiaries in the fifth trust. The decedent died without exercising any of the powers reserved under any of the trusts, and the question before the Court was whether or not transfers had taken place which were the subject of the federal estate tax law. This Court held that in the case of the two trusts in which the decedent had reserved the exclusive power of revocation a transfer had been effected at the time of his death, because until that time the gift had not been complete and the decedent had the right and privilege until death by revocation to change the disposition of the trusts upon his death. In the case of the five remaining trusts, however, in which the decedent did not have the exclusive power of revocation it was heid that no transfer took place at the time of his death and the Court, speaking by Mr. Justice Stone, gave the following as the reason:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial and consequently adverse interest, the trust for all practicable purposes had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." (p. 125.)

It was the lack of exclusive control by the decedent of the disposition of the property after his death which moved this Court to hold that there was no transfer upon which the tax could be predicated in the case of the five trusts in the Reinecke case. It is manifest that if there had not been such exclusive

control of the future disposition of the property covered by the insurance policies in the Chase National Bank case, decided on the same day, the Court would have held in the Chase National Bank case that there was no taxable transfer. Neither case therefore supports the decision of the Court below in this case, because in both cases before this Court the taxable interest was the exclusive power until his death in the decedent to direct the devolution of title, whereas in the case of a tenancy by the entireties neither tenant has at any time the power to revoke or defeat the other tenant's interest in the property, and the death of one tenant does not give to the surviving tenant anything more than what that tenant had under the original grant. Death simply destroys the interest of the deceased tenant. In this case deceased tenant's interest was not transferred at his death, but merely ceased at his death and that is all that he ever had unless he survived his cotenant. Therefore there was no interest transferred at his death which can be properly included in the value of his estate.

CONCLUSION.

It is therefore respectfully submitted that in so far as the Revenue Act of 1916, Section 202 (c), intends to include for Federal Estate Tax purposes in the gross estate of the decedent property held by decedent and his wife by the entireties, it is beyond the constitutional power of Congress and, therefore, the decision of the Circuit Court of Appeals below should be reversed.

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APPENDIX I.

"In Biehl v. Martin, 236 Pa. 519, 522, 84 A. 953, 954, 42 L. R. A. (N. S.) 555, decided as recently as 1912, the Supreme Court said:

"This estate is too well established and too well defined to be subject to judicial impairment. Recognizing its very anomalous character, we have been careful, as all our cases show, to give effect to those peculiar incidents which naturally and logically attach especially to its chief distinguishing incident, which exempts it from the ordinary legal process to which all other estates are subject.

"Fundamentally the estate rests on the **legal unity of husband and wife.** It is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to **legal intendment one and the same. Each is seized of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate.** 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit, made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case although there are two natural persons, they are but one person in law, and **upon the death of either the survivor takes no new estate.** It is a mere change in the properties of the legal person holding, and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor, the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries.' Stuckey v. Keefe, 26 Pa. 397."